Supreme Court of Illinois.

CHARLES W. PATTEN *v.* MARY J. PATTEN.

In a chancery cause where complex and intricate accounts are to be examined, they should be referred to a master for examination and report before decree, and not be heard in court except upon specific exceptions taken thereto.

The separate estate of the wife under the statute is a legal estate. And where such estate comes to the hands of the husband and is used by him with her consent, the relation of principal and agent is created, and she may compel him by bill to account to her for such estate.

If the husband claim the income of such estate as a gift from the wife, the burden is upon him to establish his claim by proof.

BILL filed by the wife to compel her husband to account for and pay over all money coming into his hands out of her separate estate, and not properly expended for the benefit thereof. The parties were married in September 1864, and the bill was filed in March 1871. A decree passed against the husband upon which he brought this writ of error.

The opinion of the court was delivered by

MCALLISTER, J.—The subject-matter involves transactions running through many years, numerous and various, constituting complex and intricate accounts. There was no reference to a master, and we are called upon by the assignment of errors to re-examine those accounts. This court upon the nature of the matter and the authority of the case of *Dubourg* v. *United States*, 7 Peters 625, has repeatedly held that a complex and intricate account is an unfit subject for examination in court and ought always to be referred to a master to be examined by him and reported in order to a final decree. When that is done specific exceptions can be taken which may be reviewed in this court. When this court is asked upon appeal or error to re-examine such an account and the party in whose favor the decree is rendered, had thus brought it into court for examination without reference to a master, the decree will be reversed, with direction to have the reference made, as was done in the case just referred to.

Besides the objections to the amount found by the decree, the counsel for plaintiff in error insists that because these parties were living together as husband and wife, from their way of dealing there arises a presumption of consent on her part to the appropriation of her income and proceeds of property by the husband, and

that she cannot afterwards recall it. The case of *Caton* v. *Ridout*, 1 MacN. & G. 47, is cited to support that position. There is no controversy in this case that the estate out of which the money or income arose, was the separate estate of the wife, complainant below, under the Married Woman Act of 1861. In the case of *Caton* v. *Ridout*, the estate in the wife was an equitable one under a settlement for her separate use.

We endeavored in the case of *Cookson* v. *Toole*, 59 Ills. 515, to point out some of the distinctions and implications arising therefrom, between the separate estate of the wife as the creature of equity, and that existing by operation of the statute of 1861. There seems, upon reflection, to be one distinction between the two estates and their incidents, that has some bearing upon the question under consideration. Although the estate of a married woman under a settlement for her separate use, was recognised and maintained in equity with the incidents of ownership, yet the common-law marital rights of the husband co-existed. At law the being of the wife became by the marriage incorporated into, and consolidated with, that of the husband, who had the absolute right to all her personal property in possession, to her choses in action reduced to possession during his life, and to the rents, issues and profits of her real estate. This being the legal aspect of the relation, she of course could seek no remedy for deprivation of equitable rights except in a court of equity, and no controversy could arise in that forum between husband and wife in respect to the separate estate of the latter without involving more or less conflict between the legal rights of the husband and the equitable right of the wife, the latter being without efficiency except in so far as they controlled and held in subserviency the husband's legal rights.

But where the wife has a separate estate within the purview of the statute, the case is entirely different. There, as between her and her husband, she holds an absolute legal estate, if that would be the character of it in a feme sole. No question as to subordination to the common-law rights of the husband can arise. For, backward as may be courts or the profession to recognise the situation, those rights are by the statute swept away and gone. She is entitled to own, hold, possess and enjoy such estate precisely as if she were sole and unmarried; as to such estate and her relations thereto, she has no husband; he is as a stranger even during the coverture. Now it seems to us that when the question arises, whether by the

fact of their living together as husband and wife and their dealings, he receiving the income of her estate, she has not so consented as to preclude her from ever recalling it, the distinction we have attempted to point out becomes essential; the status of the parties in the two cases being so materially different.

In the case of the receipt by the husband of the wife's income from an equitable estate, and where the husband's common-law rights still existed, the inquiry need go little beyond the mere question whether it being competent for her to do so, she had not waived her equitable rights in favor of her husband's legal rights; such a waiving, relinquishment, or whatever we choose to call it, being inferred from rather slight circumstances. The case of *Caton* v. *Ridout*, above cited, goes upon the principle, that a direction by the wife that the separate income which she would otherwise be entitled to should be received by the husband, would amount to consent on her part that he might receive it, and if he once got it into his hands with her consent, then it became his money, and she could never recall it. The fact of the direction to receive it might also be inferred from circumstances, the principal one of which was that the parties were living together as husband and wife. The rule is thus stated by an American author: "If the husband and wife live together and the husband receives from the trustees the income of the wife's separate estate, the wife or her representatives cannot claim to recover from the husband or his estate, more than one year's income. Whether one year's income can be recovered or not is a matter of great conflict of opinion in England. There are many cases which hold that one year's income can be recovered, and as many that it cannot. Mr. Lewis says, that the better opinion is, independent of authority, that the wife can recover nothing; and he pertinently asks if she could recover anything of the trustees on the ground of a misapplication of the income. The principle is, that the court presumes the consent of the wife to the husband's receipt *de anno in annum*, and the wife's assent is presumed to continue until revoked by something expressed or implied:" Perry on Trusts, sect. 665.

It is readily perceived why the receipt by the husband under the circumstances ought to be held a discharge of the trustees; but the rule that the mere fact of the husband getting the wife's separate income into his possession with her presumed consent, made it his property, and she could never recall it, necessarily springs from

the husband's co-existing common-law rights, because in other relations, the one receiving it by direction of the person to whom it was payable, would, in the absence of proof showing a contrary purpose, be regarded as the mere agent and hold it for the true owner. Where the estate is a mere equitable one, and a contest arises between the wife and her husband in regard to the income of such estate received by him, the question necessarily involves more or less of conflict between the principles of equity and those of the common-law pertaining to the relation of husband and wife. Such has been the force of the common law, that in the results of all such contests, they have borne some indelible impressions of its unbending rigor.

But, as before said, when similar questions arise between husband and wife, and her estate is under the statute, the common-law rights of the husband in respect to the property of the wife can have no influence whatever, simply because the statute has abrogated them. The relations of the parties may be considered with reference to the weight to be given or inference drawn from their conduct and dealings with regard to her separate property. In the determination of a claim of a wife upon the husband, like that here involved, it is indispensable for the judicial mind to become fully conscious of the change wrought by the statute, and that husband and wife, as respects her separate estate, stand before the law as strangers. Hence she may, as has been repeatedly decided by this court, make her husband her agent to collect debts due her; to receive from others the income of her estate, and to manage and control it, in her name; and under this principle his dealings with it will be presumptively in the character of agent. His receipt of proceeds and income with her consent will be in that character and for her, and they will not, in deference to marital legal rights, thereby become his property. If the husband claim such income as a gift or other legal transfer thereof by the wife to him, the burden is upon him to establish his claim by evidence. In no other mode of treating this subject can the intent and purpose of the statute be carried into effect.

Under the doctrines here enunciated, and which we have endeavored to establish upon principle and reason, the plaintiff in error has failed to satisfy us that his wife ever intended to vest him with her income which came into his hands principally with her assent. His conduct is consistent alone with the theory that

he acted as her agent, and as such received the moneys in question. She testifies to his promise to repay her, and he does not deny it. He says as a witness that he made out nearly monthly accounts for her, and when called upon, after she had withdrawn the business from him to make out a final account he readily acquiesced, made and presented one. They have both fully recognised the relation of principal and agent. He by his acts, she by bringing this suit and charging him as such. Such being the case, he, like other agents, is entitled in the absence of special contract to reasonable compensation for services within the agency and on behalf of such separate estate. This claim the court below refused to recognise. We think that was error. The decree of the court below is reversed, and the cause remanded with directions to refer the matters of account to a master, and for further proceedings not inconsistent with this opinion.

The rules of the common law which ignored the civil existence of the wife and merged it with all her rights in that of the husband, are fast being superseded in the American states by legislation, and judicial decisions based thereon. From the first legislation, the tendency has been in the direction of the entire emancipation of the wife from the control of the husband as to her separate estate—to make marriage no longer operate upon the property but only upon the person.

Whatever may be thought of the policy of establishing this doctrine, the course of legislation and decision teach us that such a consummation is inevitable sooner or later everywhere in this country; the sooner therefore it becomes established, the sooner we shall be relieved of many of the perplexing questions which must arise, and from the uncertainty which must constantly be felt, wherever only partial property rights are accorded by the statute to the wife, leaving an open field for contest between the equitable rights of the wife in her separate estate upon the one hand, and the common-law rights of the husband therein, upon the other.

The statute of Illinois under which the principal case was decided in substance provides, that all the separate property of the wife owned by her at the time of the marriage, whether real or personal, together with that which she may acquire in good faith, during coverture from any person other than her husband, shall be and remain during coverture her sole and separate property, and be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried, and not be subject to the disposal, control or interference of her husband, nor be liable for his debts. This statute may be regarded as indicating the general scope of state legislation in this country with reference to making the separate property of the wife a legal estate and placing the enjoyment of it wholly beyond control of the husband.

Regarding the separate property of the wife as a legal estate, and considering that henceforth it is so to be treated, much of the equity learning pertaining to the separate estates of married women has become obsolete.

The cases cited below illustrate the doctrine of the principal case, and indicate the current of modern decisions upon this subject.

In Illinois the court had previously held that under the statute cited, a married woman may institute and prosecute a suit for the recovery of her separate property even against her husband, should he unlawfully interfere with it: *Emerson* v. *Clayton*, 32 Ill. 493; *Cookson* v. *Toole*, 59 Id. 515. So in Pennsylvania: *Cumming's Appeal*, 11 Penna. St. 275; *Goodyear* v. *Rumbough*, 13 Id. 480 (although the general language in both these cases must be taken with caution, having been greatly modified by subsequent decisions). Also in Mis-Missouri: *King* v. *Mittalberger*, 50 Mo. 182; *Meyers* v. *Van Wagoner*, 56 Id. 115.

In New York a married woman is at liberty to avail herself of the agency of her husband in the management of her estate, with the same effect as if they were not united in marriage: *Owen* v. *Cowly*, 36 N. Y. 600; *Voorhes* v. *Bonesteel*, 16 Wallace 32.

And it has there been held that the marriage of a female mortgagee with the mortgagor does not extinguish her right of action upon the mortgage: *Power* v. *Lester*, 23 N. Y. 527.

Also that an action may be maintained by the wife against the husband for appropriating to his use her money obtained without her consent: *Whitney* v. *Whitney*, 49 Barbour 319.

So an action may be sustained upon a promissory note given to the wife by the husband before marriage: *Wright* v. *Wright*, 54 N. Y. 437. And it would seem to be settled there, that a married woman may sue her husband to enforce any right affecting her separate property in any form of action, and in the same manner that she might sue any stranger.

In Indiana a judgment obtained by the wife against the husband before the marriage remains the separate property of the wife, and she may enforce its payment by execution after the marriage: *Flenner* v. *Flenner*, 29 Ind. 565. Nor will such a judgment be held void in Pennsylvania because of the legal unity of the parties: *Williams' Appeal*, 47 Penna. St. 307.

Such judgments cannot be collaterally assailed on any other ground than crime, malice or fraud to the injury of the creditors of the judgment debtor: *Simmons* v. *Thomas*, 43 Miss. 31.

In Kansas and Iowa, promissory notes executed by the husband to the wife, for money borrowed of and belonging to her separate estate, are valid and binding upon the husband, and may be enforced by the wife against him: *Logan* v. *Hall*, 19 Iowa 491; *Monroe* v. *May*, 9 Kansas 466.

While the statutes we are considering have undoubtedly abrogated the common-law rule that the wife could not give an estate to the husband, nor the husband to the wife, based upon the idea of their being one person, yet now, where a gift between them is insisted upon, it is not a matter of presumption but it must be established like any other fact by proof: *Bachman* v. *Killinger*, 55 Penna. St. 414; *Bergey's Appeal*, 60 Id. 408; *Young's Estate*, 65 Id. 101; *Campbell* v. *Campbell*, 21 Mich. 438.

In the principal case the liability of the husband to pay interest is not discussed, but upon this point it has been held that where the husband uses his wife's money with her consent for the benefit of the family, without any agreement on his part to pay interest, he will not as a general rule be liable therefor; but if he receives the money for her use and appropriates it to his own use without her permission, he will be liable to pay interest: *Mellinger's Admr.* v. *Bausman's Trustee*, 45 Penna. St. 522; *May* v. *May*, 62 Id. 206.

C. H. W.